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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BONNEY, WADE & STUBBLEFIELD,
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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Better Monkey Grip Company, respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 28th day of October, 1957, denying

its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, on the following grounds:

I.

Petitioner urges that the Board's order, which the Court below has decreed shall be enforced, compelling the reinstatement of Whaley, a supervisor, with back pay is without basis in law. The Act, Sec. 2(3), in defining the term "employee", specifically states that the term employee "shall not include * * * any individual employed as a supervisor * * *." Sec. 10 (c) of the Act provides only for the "reinstatement of employees." Sec. 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain or coerce "employees" in the exercise of rights guaranteed by the statute. As argued by Petitioner at the Board hearing, in its exceptions and before the Board, no provision of the Act confers upon the Board the power to find that the discharge of a supervisor constitutes an unfair labor practice or to order the reinstatement of a supervisor with back pay. In fact, Congress has seen fit to specifically exempt supervisors from the protection afforded rank and file employees. Yet the Board and the Court below, although clearly denied statutory authority to take such action, have ordered the reinstatement of Whaley, a supervisor, with back pay. Petitioner, in response to the Board's argument, urges that the courts in the *N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209*, and *N. L. R. B. v. Vail Mfg. Co., 158 F. 2d 664, cert. denied, 331 U. S. 835*, cases erron-

eously construed the clear, and unambiguous statutory language used by Congress in specifically exempting supervisors from the Act.

The question of whether supervisors may be thus protected has never been considered by this Court. Petitioner, therefore, respectfully requests that this Court, because of the prime importance of this matter, grant the petition herein in order that this question of whether supervisory employees are protected under the Act may, for the first time, be judicially determined.

II.

Petitioner, in its petition for writ of certiorari (Question 4—p. 26), requested that the Board's order, which orders full and immediate reinstatement to Whaley, a supervisor, in his former or a substantially equivalent position, be modified to provide that such reinstatement be made contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work. As a basis for such request, Petitioner pointed out that if it were compelled to immediately reinstate Whaley in a job which he could not physically perform, that, as a consequence, he might himself suffer additional physical harm or cause physical injury to be done to other employees, for which Petitioner would, of course, be financially responsible and liable.

Petitioner respectfully pointed out (Pet., pp. 36-37) that in his workman's compensation suit, Whaley alleged total and permanent or, alternatively, partial and perman-

ent disability; that settlement based on such injuries was had in the amount of $2,602.50, which represents or is equal to under the Texas workman's compensation law then in effect, which allowed $25.00 a week for each week of disability, the amount he would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. The Board, taking cognizance of the fact that Whaley had suffered physical injury prior to his termination, provided in its order that back pay was to be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (T. 204). However, the Board's order failed to provide that reinstatement would, as to the actual time of reinstatement, be contingent upon Whaley's being physically able to perform his job duties at the time of reinstatement. In response to Petitioner's request, the Solicitor General and the Board's General Counsel argue (Board's brief, p. 12) that Petitioner has misconceived the order. The Board's brief states that Whaley's physical fitness is prematurely raised at this time, and that the order of the court below leaves the details to be worked out in subsequent compliance proceedings before the Board. Petitioner urges that it is, rather, the Solicitor General and the Board's General Counsel who have misconceived the court's decree (Pet., pp. 52, 55) which explicitly enforces, without qualification, the Board's order that Whaley be offered "full and immediate reinstatement to his former or a substantially equivalent position * * *," and further provides that a notice to such effect be posted for its employees. The court's decree does not grant to the Board the power to alter, modify, or change

the order—the Board's order has, in effect and application, been integrated into the court's order and decree. (Pet., pp. 52, 55.)

Moreover, since the date of this Court's denial of the petition for certiorari, the Board has, without any inquiry into the question of Whaley's present physical fitness, requested copy of Petitioner's letter offering reinstatement to Whaley and inquiring how many copies of the notices required by the court's decree and order (Pet., pp. 57, 59) will be needed by Petitioner." Copy of such formal communication is appended hereto and marked "Exhibit A." Thus, Petitioner has not misconceived, as the General Counsel's actions now so clearly demonstrate, the court's order and decree. Petitioner therefore respectfully contends that the enforcement of the court's order and decree would constitute a denial of due process as guaranteed by the Constitution, and requests that this Court modify the reinstatement order to provide that Whaley's reinstatement be made contingent, as to the time of reinstatement, upon his being physically able to perform the duties of such job, which on occasion require the lifting of heavy bales of rubber. Petitioner respectfully points out that if the Board seeks enforcement of the court's order and decree and Petitioner resists, for reason of Whaley's physical unfitness, full and immediate reinstatement and the posting of notices, Petitioner faces civil and criminal contempt action. Modification of the reinstatement and notice posting provisions would remove Petitioner from this position of jeopardy of its constitutional rights.

III.

Petitioner respectfully seeks the Court's reconsideration of Question 2 in the petition for writ of certiorari filed herein, and, in this connection, would point out to the Court that Petitioner has by the ruling of the court below been deprived of the rights guaranteed to Petitioner under Section 10(e) of the National Labor Relations Board Act. Such section provides:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before tthe Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript."

The court below has abused its discretion in refusing to recognize that under Section 10(e) the Board should be ordered to hear additional evidence to allow the consideration of the deposition testimony of Whaley, which is directly in conflict with his testimony before the Board, which deposition testimony proves conclusively by Whaley, *the Board's only witness*; that he was, by his own admission, discharged for physical inability to perform the work (Pet., pp. 21-30). Petitioner urges that the Court grant certiorari on Question 2 and that such question be considered at a full hearing before this honorable Court.

IV.

Petitioner respectfully urges the Court to reconsider Question 5 of the petition for writ of certiorari, filed herein, regarding the error of the court below in ordering the Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board. In this connection Petitioner earnestly urges that that part of the decree which orders the Petitioner to cease and desist from inducing or attempting to induce a witness to change his testimony, under the facts in this record, deprives the Petitioner of his right to prepare his defense in the event he earnestly feels that a witness has perjured himself at a Board hearing. Indeed, Petitioner felt very certain, when Whaley was interviewed and requested to change his testimony and tell the truth, that Whaley had perjured himself. Whaley was an adverse witness. He was questioned by counsel for Petitioner and by Petitioner as an adverse witness and not as a supervisor. Petitioner contends that Congress in enacting the Act did not intend to make the witnesses of the Board immune from being interviewed by Petitioner in the preparation of its defense. To interpret the Act otherwise would make it unconstitutional under the First Amendment to the United States Constitution which guarantees the right of freedom of speech. See *NLRB v. Wooster Division of Borg-Worner, 236 Fed. 2d 898*, and *NLRB v. Continental Oil, 159 Fed. 2d 362*. In the latter case the Tenth Circuit Court correctly states the rule: "So long as persuasion does not amount to coercion it is within the guarantee, but no one has the

constitutional right to interfere with, restrain or coerce another in the exercise of the same right." The order of the court below to restrain Petitioner from questioning and attempting to have a Board witness tell the truth on the witness stand, constitutes a definite interference with the exercise of Petitioner's right to freedom of speech as guaranteed by the Constitution.

The only facts in this record with reference to the manner of the attempted persuasion of Whaley by Petitioner point beyond question to merely insisting that he tell the truth. (J. A. 30, 31, 75, 23.)

Counsel for Petitioner had the absolute right, and duty, to attempt to establish the truth and present it to the Board. Petitioner strongly urges that the decree should be modified to eliminate the order that Petitioner cease and desist from such action. Petitioner therefore urges that certiorari be granted on Question 5.

Dated November 20, 1957.

Respectfully submitted,

BONNEY, WADE & STUBBLEFIELD,

By .....

Of Counsel:
HERBERT S. BONNEY

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WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

We hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified. Dated November 20, 1957.

BONNEY, WADE & STUBBLEFIELD,

By .....
Of Counsel:
HERBERT S. BONNEY

.....

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

For Rehearing.

Copies of this Petition for Writ of Certiorari have been served upon the Solicitor General of the United States and the General Counsel of the National Labor Relations Board.

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EXHIBIT A

NATIONAL LABOR RELATIONS BOARD

Sixteenth Region

Federal Center, Suite 2093, 300 West Vickery

Fort Worth 4, Texas

Telephone EDison 5-5341
Extension 284-285

October 30, 1957

Mr. L. M. Everett, President
Better Monkey Grip Company
P. O. Box 6170, 5320 Harry Hines Blvd.
Dallas 2, Texas

Re: Better Monkey Grip Company
Case No. 16-CA-814

Dear Mr. Everett:

I am advised that respondent's Petition for Certiorari was denied on October 28, 1957.

Please refer to the letter of June 20, 1957, from Regional Director Edwin A. Elliott. I shall be awaiting your advice as to how many copies of the Notice for posting you will need. Also, please forward to me a copy of your letter offering reinstatement to Robert L. Whaley. I will then be in touch with you concerning the matter of back pay and any other matters bearing upon compliance.

Your cooperation will be appreciated.

Sincerely,

JOHN F. WHITE,
John F. White
Enforcement Officer